No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,
Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,
Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,
Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

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February 17, 1981

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* The information required by Rule 28.1 of the Court is set forth at page 2, n.* of Appellants' Brief.

In the

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No. 80-195

Metromedia, Inc.,

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The City of San Diego, a municipal corporation, The City Council of San Diego, Voyd Beights, Zoning Administrator of the City of San Diego and Does 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

Introduction

A. *The Issues Not Raised*

It is well to begin with what this appeal is not about. It is not about the constitutionality of municipal or state

laws regulating the spacing or placement of outdoor advertising, nor of efforts to restrict outdoor advertising to specific areas or to preclude it from others of special scenic beauty or historic character. In fact, California has itself adopted legislation, the constitutionality of which appellants do not question, designed to control outdoor advertising without destroying it.*

Nor does this appeal place in constitutional jeopardy any federal legislation. Congress has itself taken no action requiring the removal of outdoor advertising in any commercial or industrial zone in the country.** Indeed,

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* California has expressly recognized that outdoor advertising "is a legitimate commercial use of property adjacent to roads and highways [,] . . . an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest." Cal. Bus. & Prof. Code § 5226 (West 1974). California's "reasonable controls" include restrictions on individual signs which are found to constitute traffic hazards [Cal. Bus. & Prof. Code §§ 5403(b), (d), (e), (f), (g) and (h) (West 1974), 5404 (West 1974) and 5408(b) and (c) (West Supp. 1980)]; standards for the structural integrity of signs [Cal. Bus. & Prof. Code § 5401 (West 1974)]; limits on sign size [Cal. Bus. & Prof. Code § 5408(a) (West Supp. 1980)]; spacing restrictions [Cal. Bus. & Prof. Code § 5408(d) (West Supp. 1980)]; restrictions on obscene displays [Cal. Bus. & Prof. Code § 5402 (West 1974)]; and limits on lighting [Cal. Bus. & Prof. Code § 5408(b) (West Supp. 1980)]. The state also has a detailed permit procedure [Cal. Bus. & Prof. Code § 5350 *et seq.* (West 1974 & Supp. 1980)] and requirements for compliance with zoning restrictions [Cal. Bus. & Prof. Code §§ 5320-25 (West 1974)].

** The Federal Highway Beautification Act is, in fact, explicit in providing that localities are *not* obliged to "control" billboards within the very industrial and commercial zones which are at issue here. *See* 23 U.S.C. § 131(d) (Supp. III 1979). This legislative determination is consistent with the expressed conclusion of Congress that "outdoor advertising is an integral part of the business and marketing function and an established segment of the national economy; as a legitimate business, it should therefore be allowed to operate where other industrial and commercial activities are conducted." Report of the Senate Committee on Public Works, S. Rep. No. 709, 89th Cong., 1st Sess. 6 (1965). The Johnson Administration, which introduced the legislation, voiced similar views: "The criteria to be followed in setting the standards for billboards

forty-seven of the fifty states have relied upon legislation which, like California's, regulates outdoor advertising without requiring the destruction of the entire medium of communication.* And no city in the nation of or near San Diego's size and industrial and commercial nature has enacted any prohibition on outdoor advertising of the breadth or scope of that in effect in San Diego.

B. *The Ordinance at Issue*

The case comes to this Court on stipulated facts.** Whatever violence San Diego may seek to inflict upon the lan-

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in both zoned and unzoned areas, designated as commercial or industrial, would be designed to assist the advertising industry to achieve an orderly development of this important and legitimate business enterprise." Letter of J. Connor, Secretary of Commerce, Report of the House Committee on Public Works, H.R. Rep. No. 1084, 89th Cong., 1st Sess. 4 (1965). As summarized by Federal Highway Administrator, L. Bridwell, "The Highway Beautification Act of 1965 . . . specifically recognizes the rightful place of outdoor advertising by stating it shall be permitted and, in fact, promoted within zoned and unzoned commercial and industrial areas . . . ." Hearings On a Review of the Highway Beautification Act Before the House Subcommittee on Roads, 90th Cong., 1st Sess. at 938 (May 2, 1967).

* The only exceptions are Maine, Vermont and Hawaii which have filed a brief, *amici curiae*, in this Court. The Maine statute was held unconstitutional in *John Donnelly & Sons* v. *Campbell*, No. 79-1575 (1st Cir. December 22, 1980) based upon its ban of outdoor advertising containing "ideological" speech. While a similar flaw afflicts the San Diego statute, we urge upon the Court the concurring opinion of Judge Pettine which persuasively articulates why the Maine—or San Diego—statute would be inconsistent with the First Amendment even if limited to purely commercial advertisements. In fact, in this action San Diego has acknowledged that "but for the commercial aspects" of the outdoor advertising business, "noncommercial speech" could not be sustained. Brief of Appellees at 25 [hereinafter "S.D. Br."].

** The Joint Stipulation of Facts is set forth as Appendix H to the Jurisdictional Statement at page 119a. It is also set forth in the Joint Appendix commencing at page 41a. References to "JS....a" are to appropriate pages of the Appendix to the Jurisdictional Statement; references to "¶...." are to appropriate paragraphs of the Joint Stipulation.

guage of the stipulation (*see infra* at 6-7, 10-11), it does not take issue with the proposition that it is bound by it. *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69, 73 n.1 (1946); *Gonzales* v. *Pacific Greyhound Lines,* 34 Cal.2d 749, 755, 214 P.2d 809, 813 (1950). It does not quarrel with the proposition that under California law, courts themselves are bound by the stipulation. *Bechtel Corp.* v. *Superior Courts,* 33 Cal.App.3d 405, 411-12, 109 Cal.Rptr. 138, 142 (5th Dist. 1973); *Greatorex* v. *Board of Administration,* 91 Cal.App.3d 54, 58, 154 Cal.Rptr. 37, 39 (4th Dist. 1979). It has not petitioned for relief from the stipulation. *See People* v. *Trujillo,* 67 Cal.App.3d 547, 136 Cal.Rptr. 672 (5th Dist. 1977); *Richfield Oil Corp.* v. *State Board, supra.* It does not and could not claim that any basis exists for denying the stipulation the full credence routinely accorded such documents by this Court. *See, e.g., Allstate Insurance Co.* v. *Hague,* 49 U.S.L.W. 4071, 4076 (U.S. January 13, 1981) (No. 79-938); Appellants' Brief at 3, n.* [hereinafter "App. Br."].

Nothing in the opinion of the California Supreme Court changes the relevant facts, as stipulated to by the parties.* The definition by the California Supreme Court of "outdoor advertising displays," relied upon by San Diego to narrow the sweeping statutory prohibition, provides that the statutory ban applies to all rigidly assembled signs permanently affixed to the ground or attached to buildings which constitute or are "used for the display of a commercial *or other* advertisement to the public." (JS 4a-5a, n.2)

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* Nor does the amendment to the ordinance enacted after the stipulation, so as to allow temporary political campaign signs. (San Diego Municipal Code ch. X, art. I, § 101.0700 F(12); JS 112a) The amendment is not only discriminatory in favoring one kind of speech over all others (*see* Brief *Amicus Curiae* of the American Civil Liberties Union at 12-16) but, as San Diego itself acknowledges, was not intended to permit even billboards which contain campaign advertisements to continue to survive. (S.D. Br. at 30, n.45)

(emphasis added). Whatever the ambiguity of the court's definition, it remains indisputable that:

—the scope of the ordinance sweeps beyond purely commercial advertising displays;

—*no* off-premise billboards displaying non-commercial advertisements of the sort included in Appendix I to the Jurisdictional Statement are lawful under the ordinance;

—*no* off-premise billboards displaying commercial advertisements are lawful under the ordinance;

—*no* on-premise billboards containing advertisements of any sort, except those that relate to products made or sold or services provided on-premises are lawful under the ordinance.*

It is this ordinance which is before this Court for review.

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* The opinion of the California Supreme Court does permit display of on-premise "picket sign[s] announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message." (JS 4a, n.2) It does not permit the display, even on one's own premises, of billboards setting forth political and social messages such as are set forth in Appendix I to the Jurisdictional Statement. Nor does it permit the display on one's own property of *any* advertisements, commercial or non-commercial in nature, setting forth the views of others.

ARGUMENT

I

The Destruction of the Medium of Outdoor Advertising Is Inconsistent With the First Amendment.

In our main brief, we pointed to the constitutional disfavor with which any effort to destroy distinct media of communications has historically been viewed by this Court. Unable to quarrel with this submission, San Diego devotes a good deal of effort in its brief to a kind of linguistic legerdemain which seeks to evade the plain meaning of the facts to which it has stipulated. Having defined the nature and functions of "outdoor advertising" with precision in the stipulation (JS 123a, 124a, 125a-126a, ¶¶ 21, 23, 28), having recognized the distinction between such advertising and on-site advertising (JS 123a-124a, ¶ 22), having set forth how outdoor advertising is purchased (JS 124a-125a, ¶ 24) and how it is presented (JS 125a, ¶ 25), and having stipulated that the San Diego ordinance would result in *"eliminating outdoor advertising within the City of San Diego"* (JS 126a, ¶ 29),* San Diego now argues (S.D. Br. at 16) that appellants' so-called "position" that " 'outdoor advertising' is being prohibited" is inaccurate.

To the extent that this argument is premised upon the contention that since "on-site" signs may remain in San Diego the medium of outdoor advertising will survive, it simply ignores the fact that the two differ in their very nature and purpose. Outdoor advertising is, at its essence, a medium which is available to all-comers for the display of all their messages. On-site displays, by their nature, deal only with the businesses, goods or services available on the property on which the sign is located; they are not intended or understood to be available for communication generally. (JS 123a-124a, ¶¶ 22, 22(d))

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* Emphasis added.

Similarly, to the extent the argument is bottomed upon the minor exceptions contained within the ordinance which allow advertising on bus benches, arcades and the like, the argument simply ignores the historic and definable characteristics of outdoor advertising—*i.e.*, easily visible signs, in standardized sizes, the copy of which customarily changes monthly, which are made available to all and are usually purchased on the basis of a presentation requiring multiple exposure. (JS 123a-125a, ¶¶ 22-25)

It is, in short, "outdoor advertising" as historically understood (and defined by the parties) that is "a means of communication and a media for the expression of ideas." (JS 123a, ¶ 21) That is the "outdoor advertising" that was recognized by Congress as one of the nation's "communications media." *See* App. Br. at 19. It is that that the San Diego ordinance seeks to "eliminate." (JS 120a, 126a, ¶¶ 2, 29)*

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* Outdoor advertising has, as well, been recognized as a separate medium in the very source relied upon by the United States to demonstrate its supposed insignificance. (Brief for the United States as *Amicus Curiae* at 5, n.8; 27-28, n.28 [hereinafter "U.S. Br."]) According to the United States, since the document entitled "Advertising—Estimated Expenditures by Medium: 1965-1978", Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States* 595 (1979) concludes that "only" 1.1% of total advertising expenditures were spent on outdoor advertising in 1978, the "volume of advertising reaching the public will not be significantly diminished by further restrictions on billboards." (U.S. Br. at 27-28, n.28) Passing the question of whether $465 million (in 1978) is so self-evidently modest a sum as it is apparently viewed by the United States, the reliance upon the 1.1% figure proves both more and less than is constitutionally tolerable. For example, the same study indicates that "only" 2.7% of advertising expenditures were expended on all weekly magazines, 1.7% on all monthly magazines, .4% on all network radio advertising and .2% on all farm publications. It would surely be a quixotic constitution that would allow the destruction of such forms of communication based upon their limited size. Moreover, the suggestion that because 1.1% of advertising dollars is expended on outdoor advertising the number of advertisers is small, is simply inaccurate. If anything, the figure reflects the fact that outdoor advertising is *less* expensive than other forms of advertising. (*See* App. Br. at 25 n.*; *see also* JS 125a-126a, ¶ 28.)

The suggestion that the elimination of outdoor advertising can be justified constitutionally because such advertising provides information that some members of the public would prefer not to receive is at the heart of San Diego's submission. (S.D. Br. at 26-28) But our system is premised on the notion that one may use the power of language and speech to convey a message—even an undesired message—in the hope of persuading the reader or listener. This Court has recognized the special nature of the privacy interest each individual has with respect to his home; this exception to the general principle has never been held to sanction so complete a ban on exposure to a variety of messages as the ordinance would compel in the interests of avoiding "obtrusiveness". *Compare Cohen* v. *California,* 403 U.S. 15 (1971) and *Spence* v. *Washington,* 418 U.S. 405 (1974) *with FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978) and *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). *See also Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).*

Acceptance of such a ban would go far to ensuring that individuals are exposed only to messages they wish to receive at times and in places they choose to receive them.**

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* Indeed, even when the asserted state interest of preserving residential privacy has been raised, this Court frequently has held the benefit of the free dissemination of ideas to outweigh any assertions of intrusiveness as justification for regulation. *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 620 (1980); *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2326 (1980); *Carey* v. *Brown,* 100 S.Ct. 2286 (1980). *See Troyer* v. *Town of Babylon,* 483 F.Supp. 1135 (E.D.N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton,* 628 F.2d 1346 (2d Cir.), *aff'd,* 49 U.S.L.W. 3371 (U.S. Nov. 17, 1980).

** In a similar vein, the United States argues that since outdoor advertising displays are erected along highways, no comparison can be made with "streets" recognized to be historically dedicated to public communications in *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 515 (1939) (Opinion of Roberts, J.).

Such an approach is consistent neither with the First Amendment nor with the belief undergirding it in both the power of communication and the ability of our citizenry to make choices for themselves—when they are informed.

Nor can San Diego's reliance (S.D. Br. at 6, 26-28) on early opinions of this Court referring to the allegedly "intrusive" nature of billboards be sustained. Not one decision relied upon even considered First Amendment arguments. Indeed, in the only case cited decided after the First Amendment was deemed applicable to the states (*Packer Corp.* v. *Utah,* 285 U.S. 105 (1932)), the First Amendment was neither urged by counsel nor determined by the Court.* And, of course, *Packer* itself pre-dated by over four decades this Court's decision affording First Amendment protection to commercial as well as non-com-

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(U.S. Br. at 23-24) If the United States is attempting to distinguish "highways" from "streets", it has overlooked the fact that the very thoroughfares involved here are those of the commercial and industrial zones of San Diego. There is nothing in the record to suggest that San Diego's thoroughfares are of a different character than those involved in *Hague.*

In any event, the California Vehicle Code fails to support the distinction. The term "highway" is defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." Cal. Veh. Code § 360 (West 1971). Lest there be any question that "highway" means "street", the Code continues, "[h]ighway includes street." *Id.* And, as if to avoid any debate on the point, that "[s]treet includes highway." *Id.* at § 590 (West 1971).

* *See Cammarano* v. *United States,* 358 U.S. 498, 513 n.* (1959) (Douglas, J., concurring). As Justice Douglas noted there:

> "In *Packer Corp.* v. *Utah,* 285 U.S. 105, the First Amendment problem was not raised. The extent to which such advertising could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut,* 310 U.S. 296; *Martin* v. *Struthers,* 319 U.S. 141; *Breard* v. *Alexandria,* 341 U.S. 622; *Roth* v. *United States,* 354 U.S. 476) has therefore never been authoritatively determined."

mercial speech in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

There is, in short, no First Amendment authority which can justify the total destruction of the medium of outdoor advertising. San Diego's blunderbuss ordinance is at odds with the very principles which give life to the First Amendment.

II

None of the Arguments Advanced by the City and *Amici* Supports the View That the Ordinance Is a Valid Regulation of the Time, Place and Manner of Speech.

Whether this case is viewed as one involving commercial speech, non-commercial speech, or more appropriately, a mixture of both, the arguments advanced by San Diego and its *amici* do not support the view that the ordinance can stand as a valid time, place and manner regulation.*

Since the record conclusively demonstrates that one of the three elements of the time, place and manner analysis—the existence of adequate alternative means of communication—simply cannot be met, that should end the inquiry at the outset. Apparently San Diego and the *amici* who support it recognize this to be the case, for their efforts to avoid the stipulated facts are little short of frenzied. The fact remains that the parties have agreed that:

> "Valuable commercial, political and social information is communicated to the public through the use of out-

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* Neither the City nor its *amici* have addressed themselves to the fact that the application of time, place and manner analysis is ill-suited to a situation in which the effect of the state's action is to eliminate an entire medium. *See* App.Br. at 30-31. We will not repeat that analysis here except to refer the Court to the well-reasoned and, we believe, persuasive concurring opinion of Judge Pettine in *John Donnelly & Sons* v. *Campbell*, No. 79-1575, *supra*, slip op. at 22-27.

> door advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (JS 125a-126a, ¶ 28)

Explanations of the stipulation range from the incomprehensible ("The fact that many people rely on billboard advertising does not imply that it is any more effective than alternatives . . .")* to the condescending ("[i]t is understandable that a busy under-budgeted litigator would enter into such a stipulation . . .")** to the insulting.*** Notwithstanding all, the stipulation affords ample basis for reaching the same conclusion as that set forth by this Court in *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93 (1977): *i.e.* "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication' . . ." and—at the very least—that other options "may be less effective media for communicating the message. . . ."†

The ordinance fails to satisfy the requisites for a legitimate time, place and manner standard in still another distinct fashion since it can hardly be considered content neutral. While San Diego argues that the ordinance does not seek to prohibit any message based on content in that its objectives "are unrelated to the subject of an *advertisement*" (S.D. Br. at 20)‡, it ignores the fact that, as the phrasing of the brief itself reveals, the ordinance's purpose, as stated in its preamble, was, *inter alia,* to promote

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* S.D. Br. at 30.

** Brief *Amici Curiae* of the City of Alameda, *et al.* at 18, n.14.

*** *See* Brief *Amicus Curiae* of the City and County of San Francisco at 18, n.12.

† *See generally* Brief in Support of Jurisdictional Statement Filed by *Amici Curiae* Who Rely on Outdoor Advertising to Communicate.

‡ Emphasis added.

the use of signs for identification and to *eliminate* their use for advertising. Section 10.1.0700 of the ordinance provides in pertinent part:

> "A. Purpose and Intent
>
> > "It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; . . . to ensure that signing is used as identification and not as advertisement . . . ." (JS 106a)

Thus the ordinance explicitly distinguishes among signs on the basis of their message.* Whether viewed as a content-based distinction or as one based on subject matter, the result under decisions of this Court is the same: such a distinction may not be the basis for such a regulation. *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2326 (1980); *see also Carey* v. *Brown,* 100 S.Ct. 2286 (1980).

The United States proffers two arguments in support of its assertion that the San Diego ordinance is content neutral; both are totally unresponsive to the issue. It argues, first, that the ordinance does not discriminate on the basis of content because "it is the billboard itself that is objectionable." (U.S. Br. at 29) But as Judge Pettine noted:

> "[I]n fact, people do not put up billboards simply for the sake of erecting objects along the roadways. As a practical matter, billboards do not have a purpose and meaning apart from their potential for speech." *John Donnelly & Sons* v. *Campbell,* No. 79-1575, slip op. at 21-22 (1st Cir. December 22, 1980) (Pettine, J., concurring).

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* Other ways in which the ordinance departs from content neutrality—its discrimination between editorial and other political messages and the content-based exemptions it authorizes—are discussed in our initial brief at 32.

Indeed, elsewhere in its brief, the United States is quick to point out that it is the billboard's "message" which makes it so particularly intrusive. (U.S. Br. at 11)

The United States next argues that the ordinance should not be viewed as an impermissible restriction based on content because it is a restriction based on place. This argument, as well, misses the mark. If this were so, how is it that a property owner may not use his own billboard to advertise the opening of a new store down the block? Why may he not use it to demonstrate his support for San Diego's "underpaid cops" (*see* J.S. App. I)? Why may election signs be erected temporarily but other temporary signs, including signs related to political and social issues uninvolved in an election, not be?

Both together and separately, the exemptions for on-site identification signs and temporary election signs confirm the content-based aim of the legislation and demonstrate that the ordinance "undeniably discriminates 'between lawful and unlawful conduct based upon the content of the . . . communication.'" *John Donnelly & Sons* v. *Campbell*, No. 79-1575, slip op. at 22 (1st Cir. December 22, 1980) (Pettine, J., concurring) quoting *Carey* v. *Brown*, 100 S.Ct. 2286, 2290 (1980).

III

The Invocation of the Police Power Is Insufficient to Justify the Ordinance.

San Diego and the *amici* who support it have taken great pains to detail the scope of the police power, its application to zoning and land use regulation, and the propriety of its exercise in furthering the goals of traffic safety and aesthetics. (S.D. Br. at 7-15; *see* U.S. Br. at 9-17) While many of the principles there urged would be unexceptionable in the absence of the competing constitutional concerns raised in this case, they can hardly be viewed in the analytical vacuum urged by San Diego.* Appellants' challenge to San Diego's all-engulfing exercise of the police power has always been premised on the fact and bottomed on the view that, at the very least, a significant speech component is at issue here. (*See* App. Br. at 34-36.)

The fact that the ordinance would totally eliminate outdoor advertising is entitled to particular weight in assessing the proper scope of the police power. *See* App. Br. at 35-41. *And see John Donnelly & Sons* v. *Campbell, supra,*

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* This approach is perhaps best illustrated by the brief of the United States. It states:

> "Appellants do cite (Br. 36-38) this Court's decision in *Young* v. *American Mini-Theatres, Inc., supra,* for the proposition that a total ban on activity raises special constitutional concerns. But *Young* and the other decisions of the Court relied upon by appellants all arose under the First Amendment, one of the 'specific constitutional limitations' on the exercise of the power." (U.S. Br. at 17, n.18)

We are somewhat at a loss in responding to such an argument since it is precisely that "specific constitutional limitation" which is involved in this case. Although the brief of the United States thereafter refers the reader to its subsequent discussion of the First Amendment issues raised by this case (*id.*), such an approach simply ignores the fact that the scope of the police power cannot be evaluated in the abstract, but must be measured by reference to competing "constitutional limitations."

slip op. at 24-27 (Pettine, J., concurring). However, even apart from this extraordinary—and, we believe, decisive—aspect of this case, San Diego has still utterly failed to bear its burden of demonstrating that the ordinance is a "precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2325, 2334 (1980).*

With respect to the plainly significant goal of traffic safety, San Diego simply has not begun to demonstrate that the scope of the ordinance is necessary to the achievement of that goal or, indeed, that the ordinance furthers that goal at all. *See* App. Br. at 41-43. As the opinion of the Court in *John Donnelly & Sons* v. *Campbell, supra,* concluded:

> "The statute's condemnation is universal, regardless of the nature of the ways, of the extent of the unimpeded view, and of particular traffic conditions. In the interest of workable enforcement some overbreadth is permissible, but the disparity here seems far from minimal. Moreover, we can think of no reason to believe that the signs which the statute permits will be any less distracting than some of those that are prohibited. The contrary may well be supposed. Vehicular signs, permitted under the statute, have long been recognized as posing traffic safety problems. *See Railway Express Agency, Inc.* v. *New York,* 1949, 336 U.S. 106, 109. Other types of signs are permitted because they are deemed particularly important, *see* n. 4, ante; these, too, would seem particularly distracting. Finally,

* The test articulated in *Consolidated Edison* is particularly appropriate here since the speech at issue there, as here, contained both non-commercial and commercial aspects. To the extent San Diego has suggested that this Court's opinion in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 100 S.Ct. 2343 (1980) provides a more appropriate standard for analyzing the protections afforded purely commercial speech, we have previously demonstrated that the ordinance cannot withstand analysis under the tests set forth in the Court's opinion in that case, let alone those articulated in the concurring opinions. *See* App. Br. at 28-29.

> and significantly, on-premise signs seem far greater traffic hazards than signs conveying information for future use. One need hardly ask which is more likely to disturb the traffic pattern, a sign that advertises that some product or service is available ahead, or one that causes the passenger or driver to exclaim that the spot is just being passed.
>
> "The fact that the statute may retain some dangerous signs and leave some that are not is not determinative, but does diminish the overall importance, from the standpoint of safety, of the restrictions effected. Concededly the purpose of all signs is to attract attention, and it must be that they generally do so or plaintiffs could not operate. *Moore* v. *Ward*, Ky., 1964, 377 S.W.2d 881, 886. Nevertheless, it does not follow that the prohibited signs pose a significant threat to highway safety; the record before us strongly suggests the contrary. We hold on the present record that highway safety is not a sufficient ground, standing alone, to support so broad a statute, and we have doubts whether it is even a strong contributing factor." *Id.*, slip op. at 10-11.*

San Diego's brief does not address the problems inherent in invoking aesthetic goals to justify the ordinance here. *See* App. Br. at 43-45. In fact, it does not address its interest in improving the appearance of the City at all. The arguments of *amici* who do address the question illus-

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* San Diego's brief itself reflects the contradiction which the First Circuit found so intolerable. Although on the one hand, it urges that signs which can be viewed from the street pose a special danger to traffic safety (S.D. Br. at 13-14), on the other it urges that advertisers can communicate with travelers by the use of on-site signs, bench signs and signs on vehicles. (S.D. Br. at 30) And *compare* U.S. Br. at 16 ("Billboards identifying a commercial site or advertising activities there . . . typically are more permanent displays to which motorists might become accustomed over time . . .") with *id.* at 17 ("On-premise signs often are also essential for informational purposes to enable the motorist to locate the commercial establishment.").

trate that it is simply insufficient as a basis for the total elimination of a communications medium.

Amici argue that the elimination of billboards is necessary to preserve scenic phenomena and natural beauty. The City and County of San Francisco urges, for example:

> "[I]t is difficult to imagine how a reasonable person could conclude that a series of 12 by 24 foot structures, irrespective of what is painted on them, is more aesthetically pleasing than a view of such natural and man-made scenic phenomena as the Golden Gate Bridge, Coit Tower or the San Francisco Bay . . ." Brief *Amicus Curiae* at 12 n.8.

And the brief, *Amicus Curiae,* of the National Institute of Municipal Law Officers comments on the "unique aesthetic needs" of South Lake Tahoe, California, a city "'situated in a scenic mountain-forest-lake with a reputation as a restful resort community.'" *Id.* at 10. But whatever else may be said of this case, it does not involve settings such as are so evocatively, if irrelevantly, portrayed by the *amici.*

We are told that "residents of or visitors to commercial and industrial areas should be entitled, to the extent possible, to the same benefits of an aesthetically pleasing environment that individuals in other areas enjoy." (U.S. Br. at 12) To some extent, this argument appears bottomed on the wish that commercial and industrial areas were, in fact, neither commercial nor industrial. It is, as well, inherently inconsistent with the decision of San Diego to permit on-site outdoor advertising to remain in the 2.8% of San Diego that is zoned for commercial and industrial uses and is at issue here. (JS 123a, 121a, ¶¶ 20, 9) More broadly, it assumes what cannot be assumed: that the societal interest in preserving a "means of communication and a media for the expression of ideas" (JS 123a, ¶ 21) is entitled to *no* weight whatever when juxtaposed against

the assertion of aesthetic values. That is not the theory upon which the Federal Highway Beautification Act was based.* And, as Judge Pettine concluded, it is surely inconsistent with the First Amendment:

> "In undeveloped areas, it may very well be that signs and billboards are the principal eyesores; here, the benefit will be great, for their removal would return the landscape to its pristine beauty. In industrial and commercial areas, however, signs and billboards are but one of countless types of manmade intrusions on the natural landscape. Without denying that some perceptible change for the better would occur even here, I question whether the margin of improvement obtained in these areas can really justify the state's decision to virtually eradicate commercial speech by sign and billboard. *Cf. Schneider* v. *New Jersey*, 308 U.S. at 162-63. If any one, consistent thread runs through First Amendment jurisprudence, surely it must be the recognition that the preservation of free expression is neither easy nor comfortable. It often requires of us that we tolerate things we would rather not see and endure things we would rather not hear. It requires that we accept a less-than-perfect world—a world that is not as quiet, as neat, as refined, or

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* Indeed, that Act itself reflects a careful balancing between aesthetic concerns and the need to maintain adequate means of communication. *See supra*, page 2, n.**. It is noteworthy that in its brief, *amicus curiae*, submitted to this Court in *Oklahoma* v. *Pile, petition for cert. pending*, No. 79-1617, the United States, in the course of criticizing the Oklahoma Supreme Court's rejection of traffic safety as a rationale for the Oklahoma law, observed that "[t]he [Oklahoma] court thereby ignored the common-sense basis for the distinction between commercial or industrial zones, where signs do not stand apart from the landscape and command attention, and rural areas bordering highways, where the impact of such signs is more substantial." Brief of the United States as *Amicus Curiae* at 15 (filed August 15, 1980). It is that distinction, supported by "common-sense" as well as constitutional principles, which the United States totally ignores in its current brief.

> even, I believe, as scenic as we might like." *John Donnelly & Sons* v. *Campbell, supra,* slip op. at 35 (Pettine, J., concurring) (footnotes omitted).

If, in fact, the price of a world "as scenic as we might like" is as high as that required by San Diego, it is constitutionally exorbitant. Such a world, necessarily and inevitably, would be one in which the scope and variety of public expression would be significantly diminished. It is not a price the First Amendment permits San Diego to exact.

CONCLUSION

The decision of the California Supreme Court should be reversed.

Respectfully submitted,

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